LIBRARY
SUPREME COURT, U. S.

JUL 10 1974

IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-1861

SOUTH GWINNETT VENTURE, a Partnership Composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green,
Petitioner,

vs.

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually, and as Chief Building Inspector of Gwinnett County,
Respondents.

ROCKBRIDGE ASSOCIATES, LTD., a Georgia Limited Partnership,
Petitioner,

vs.

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually, and as Chief Building Inspector of Gwinnett County,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

HOSEA ALEXANDER STEPHENS
2334 National Bank of Georgia Building
Atlanta, Georgia 30303
Attorney for Respondents

HOMER M. STARK
P.O. Box 8
Lawrenceville, Georgia 30245
Of Counsel

St. Louis Law Printing Co., Inc., 812 Olive Street 63101 314-231-4477

INDEX

Page

Statement of the case 1

Questions presented 2

Reasons for denying the writ 3

Conclusion 12

Cases Cited

Barton v. Atkinson, 228 Ga. 733, 187 S.E.2d 835 8

Berman v. Parker, 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27 5

Best v. Humboldt Placer Mining Co., 371 U.S. 334, 83 S.Ct. 379, 9 L.Ed.2d 350 10

Brawner Building, Inc. v. Shehyn, et al. (App.D.C.), 442 F.2d 847 10

Central Bank and Trust Company v. City of Miami Beach, 392 F.2d 549 ..... 11, 12

City of St. Paul v. Chicago, St. Paul, M. and O. Ry., 413 F.2d 762 9

Diedrich v. Zoning Commission of the District of Columbia (App.D.C.), 393 F.2d 666 6

Garrity v. District of Columbia (App.D.C.), 86 F.2d 207 8

Gerstenfeld v. Jett (App.D.C.), 374 F.2d 333 8

Goldblatt v. Hempstead, 369 U.S. 590, 82 S.Ct. 987, 8 L.Ed.2d 130 9

Gorieb v. Fox, 274 U. S. 603, 47 S. Ct. 675, 71 L.Ed. 1228 ..... 3, 4

James v. Valtieira, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed. 2d 678 11

Lewis v. District of Columbia (App.D.C.), 190 F.2d 25.. 9

Louisville Gas Co. v. Coleman, 277 U.S. 32 9

Morgan v. United States, 304 U.S. 1 11

Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio, 301 U.S. 292 11

Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic, 400 U.S. 62, 91 S.Ct. 203, 27 L.Ed.2d 203 10

South Gwinnett Venture et al. v. Pruitt, et al., 5 Cir., 482 F.2d 389 ..... 1-2, 6

South Gwinnett Venture, et al. v. Pruitt, et al., 5 Cir., 491 F.2d 5 2

United States v. Western Pacific Railroad Co., 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed. 2d 126 10

Village of Belle Terre, et al. v. Boraas, et al., No. 73-191, October Term, 1973, decided April 1, 1974. 42 Law Week 4475 ..... 4, 9

Village of Euclid v. Ambler Realty Co., 272 U. S. 365, 47 S. Ct. 114, 71 L.Ed. 303 ..... 3, 4

Zahn v. Board of Public Works, Etc., 274 U. S. 325, 47 S. Ct. 594, 71 L.Ed. 1074 ..... 3, 5

IN THE

SUPREME COURT OF THE UNITED STATES

No. 73-1861

SOUTH GWINNETT VENTURE, a Partnership Composed of South Gwinnett Apartments, Inc., Jack Green and Bonnie Green,
Petitioner,

vs.

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually, and as Chief Building Inspector of Gwinnett County,
Respondents.

ROCKBRIDGE ASSOCIATES, LTD., a Georgia Limited Partnership,
Petitioner,

vs.

W. R. (DUDGE) PRUITT, JULIAN W. ARCHER, MARION BUICE, RAY W. GUNNIN, and CARVIS P. WILLIAMS, Individually, and as Commissioners of Gwinnett County, Georgia, and RALPH HERRINGTON, Individually, and as Chief Building Inspector of Gwinnett County,
Respondents.

RESPONDENTS' BRIEF

In Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

STATEMENT OF CASE

In addition to the recitals made by Petitioners it should be noted that subsequent to the first decision by the Fifth Circuit Court of Appeals, *South Gwinnett Venture et al v. Pruitt, et al.*

5 cir., 482 F. 2d 389, the Respondents herein themselves petitioned this Honorable Court for Writ of Certiorari, No. 72-1704, October Term, 1972. This petition was dismissed by stipulation subsequent to the en banc decision of the Fifth Circuit Court of Appeals, *South Gwinnett Venture, et al v. Pruitt, et al*, 5 Cir., 491 F.2d 5.

Moreover, while joining as Applicants for certiorari the case made by the respective petitioners is not identical. The petitioner South Gwinnett Venture made no allegation that secret information had been utilized against it by the Gwinnett County Commissioners; only Rockbridge Associates, Ltd. made such assertion. The Petitioners, therefore, are not similarly situated.

QUESTIONS PRESENTED

Respondents submit that the questions presented are:

1. Whether discretionary judgments made by a local zoning authority when considering on a case-by-case basis requests from individual property owners seeking amendments to zoning ordinances and relief from existing restrictions as they apply to specific parcels of land are proper subjects for the exercise of Federal jurisdiction?

2. Whether, assuming the foregoing question is answered in the affirmative, such individual property owners, as a condition precedent to invoking Federal Jurisdiction, must first exhaust administrative remedies afforded and State judicial processes provided by the State?

REASONS FOR DENYING THE WRIT

I. Petitioners are seeking the extension of Federal jurisdiction into a purely local area so as to make United States District Courts serve as "zoning appeal boards". This would be contrary to the principles announced in *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303, and *Gorieb v. Fox*, 274 U. S. 603, 47 S. Ct. 635, 71 L. Ed. 1228.

II. The differentiation sought by Petitioners between "the adoption of a legislative plan for the entire community" and a "case-by-case adjudicative plan" would create a new basis for the exercise of Federal Jurisdiction, and thereby flood the Federal Courts with actions seeking to review such decisions. This Honorable Court has never recognized such distinction but, on the contrary, has considered decisions of local zoning authorities to be legislative in character. *Zahn v. Board of Public Works, Etc.*, 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074.

III. The Petitioners, as unsuccessful applicants for re-zoning, applied directly to the District Court for relief by-passing the Board of Zoning Appeals and without seeking redress in the Georgia Courts.

These reasons will be discussed seriatim.

I

The District Courts Should Not Serve as Zoning Appeals Boards.

In its opinion dismissing the complaints (Appendix A-3) the District Court pointed out that the exercise of jurisdiction would cause District Courts to serve as "zoning appeal boards". In so stating the District Court was being realistic.

That such end result was never intended by this Court is inherent in the language used in the landmark case of *Village of Euclid v. Ambler Realty Co.*, 272 U. S. 365, 47 S. Ct. 114, 71 L. Ed. 303:

> "If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."

And in *Gorieb v. Fox*, 274 U. S. 603, 47 S. Ct. 675, 71 L. Ed. 1228, it was stated:

> "State legislatures and city councils, who deal with the situation from a practical standpoint, are better qualified than the courts to determine the necessity, character and degree of regulation which these new and perplexing conditions require; and their conclusions should not be disturbed by the courts unless clearly arbitrary and unreasonable."

Village of Belle Terre, et al. v. Boraas, et al., No. 73-191, October Term, 1973, decided April 1, 1974. *42 Law Week 4475*, restated these principles. We quote (p. 4477):

> "We deal with economic and social legislation where legislatures have historically drawn lines which we respect against the charge of violation of the Equal Protection Clause if the law be 'reasonable, not arbitrary' (quoting *Royster Guano Co. v. Virginia*, 253 U. S. 412, 415) and bears 'a rational relationship to a [permissible] state objective.' *Reed v. Reed*, 404 U. S. 71, 76."[1]
>
> * * * * * * *
>
> "The regimes of boarding houses, fraternity houses, and the like present urban problems. More people occupy a

[1] The dissent of Mr. Justice Marshall, while noting a First Amendment objection to the local ordinance, nonetheless states: "Our role is not and should not be to sit as a zoning board of appeals."

given space; more cars rather continuously pass by; more cars are parked; noise travels with crowds.

A quiet place where yards are wide, people few, and motor vehicles restricted are legitimate guidelines in a land use project addressed to family needs. This goal is a permissible one within *Berman v. Parker, supra.*[2] The police power is not confined to elimination of filth, stench, and unhealthy places. It is ample to lay out zones where family values, youth values, and the blessings of quiet seclusion, and clean air make the area a sanctuary for people."

II

The Distinction Sought by Petitioners Between Comprehensive Zoning Plans and Case-by-Case Determinations Is Not Sustainable.

That a local zoning authority acts in a legislative, and not a judicial capacity, has long been recognized. In *Zahn v. Board of Public Works, Etc.*, 274 U. S. 325, 47 S. Ct. 594, 71 L. Ed. 1074, the following language appears:

> "The most that can be said is that whether that determination was an unreasonable, arbitrary or unequal exercise of power is *fairly debatable*. In such circumstances the settled rule of this Court is that it will not substitute its judgment for that of *the legislative body* charged with the primary duty and responsibility of determining the question." [Emphasis supplied.]

The differentiation sought by Petitioners between zoning for an entire community and rezoning of property of individual owners on a case-by-case basis has no support in the decided

---

[2] 348 U.S. 26, 75 S.Ct. 98, 99 L.Ed. 27.

cases. In either instance the Courts recognized exercise of a legislative as opposed to a judicial function.

Diedrich v. Zoning Commission of the District of Columbia (App.D.C.), 393 F.2d 666, is illustrative. A *comprehensive* map was promulgated in 1958. Seven years later, on November 27, 1965, the appellant-owners applied to the Zoning Commission for an amendment to the map, i.e., *rezoning* of their property. Said the Court:

> "The functions of the Commission in preparing and promulgating plans and maps are obviously exercises of judgment legislative in character and are subject to judicial control only if arbitrary or capricious. Since we cannot say that the challenged action was devoid of evidentiary support or irrational, we are obliged to affirm."

(a)

Petitioner Rockbridge Associates, Ltd. was not denied a Fourteenth Amendment protected right.

Respondent begs leave at this point to quote in extenso from the dissent set forth in the first decision by the Fifth Circuit Court of Appeals, *South Gwinnett Venture et al. v. Pruitt, et al.*, 5 Cir., 482 F.2d 389:

> "The majority opinion groups these two cases together and over-reacts, I think, to the contention of one of the plaintiffs that as to it the County Commissioners in star chamber fashion used non-record secret evidence. I, naturally, have examined that charge carefully. First, it must be noted that only Rockbridge Associates, Ltd. makes this contention. South Gwinnett Venture's case was considered by the Commissioners on November 24, 1970, and again on December 1, 1970, and *there is no contention that any secret evidence was used in the consideration of that case.*

> The Rockbridge case was considered by the Commissioners earlier on August 25, 1970 and September 9, 1970, and it is in connection with these earlier hearings that Rockbridge claims the use of secret evidence. *Secondly, I think this charge is unsubstantiated.* What happened is this: at the August 25, 1970 hearing one of the Commissioners moved to 'table the decision for two weeks so that he could obtain additional studies and consult with the Engineering Department.' *This does not sound star chamberish.* His intentions were announced in open meeting. The postponement was for two weeks. The Engineering Department of Gwinnett County is probably not so large that plaintiffs could not have ascertained whatever information it furnished the Commissioners had they so desired. Nor does any reason appear why they did not inquire at the resumed hearing on September 9, 1970, as to what additional studies, if any, the Commissioners had obtained. Rockbridge argues that the Commissioners have refused to disclose the contents of their conversation with the Engineering Department and the additional studies. *Nothing in the record substantiates this argument.* Nor was there any request by plaintiffs for any more complete or detailed findings of fact by the Commissioners. *All this suggests that plaintiffs' desire to make a federal case exceded their fear of deprivation of due process.*" [Emphasis supplied.]

From the foregoing it is obvious South Gwinnett Venture achieves a tactical advantage if its case is equated with that of Rockbridge Associates, Ltd. for decisional purposes. Additionally, that the "star chamber" allegations made by Rockbridge Associates, Ltd. are lacking in substance.

Assuming, arguendo, however, that so called "secret evidence" was to some extent utilized by the Gwinnett County Commission, this is not inconsistent with the legislative process

nor does it deny Fourteenth Amendment protected rights. Historically, legislative bodies have utilized reports, studies, charts, scientific texts, etc., from outside sources during their deliberations. As pointed out in *Garrity v. District of Columbia* (App.D.C.), 86 F.2d 207, 215

> "And it is well settled that a zoning commission acts in a legislative capacity. *Zahn v. Board of Public Works*, 274 U.S. 325, 47 S.Ct. 594, 71 L.Ed. 1074. It is not, therefore, *any more than a legislative committee would be*, subject to the rules of procedure which govern the conduct of judicial hearings. Only if its action is palpably arbitrary can a court set it aside."

Gerstenfeld v. Jett (App.D.C.), 374 F.2d 333—a rezoning case—affords an additional example. We quote (p. 335):

> "Appellant also claims that in the reclassification determination the Zoning Commission illegally considered the recommendation of the National Planning Commission which was outside the hearing record and that its final determination was arbitrary, capricious, and unsupported by substantial evidence. It appears that the recommendation of the Planning Commission was available at the hearing, and that its final recommendation, sent several months later, was a duplication of what was originally available. Further, the Zoning Commission, operating in a quasi-legislative capacity, is not required to limit its decision making to evidence within the hearing record. (cits.)"

And more recently the Supreme Court of Georgia in *Barton v. Atkinson*, 228 Ga. 733, 187 S.E.2d 835, stated that the reading of reports from local boards of education, public works departments, and public health departments "at each public hearing is not of the essence."

(b)

Neither due process nor equal protection require that petitioners be afforded the most profitable utilization of their property.

Petitioners' subtle appeals to emotion as to the cherished right of private ownership of property in the United States is not only here misplaced but late in point of time. The police power is, and has long since been recognized to be, a condition or limitation upon the right to hold, use, and enjoy property. In *Goldblatt v. Hempstead*, 369 U.S. 590, 592, 82 S.Ct. 987, 989, 8 L.Ed.2d 130 this Court stated:

> "If this ordinance is otherwise a valid exercise of the town's police powers, the fact that it deprives the property of its most beneficial use does not render it unconstitutional. (cits.)"

Accord—*City of St. Paul v. Chicago, St. Paul, M. and O. Ry.*, 413 F.2d 762, collating cases.

Attention is invited to the holding in *Lewis v. District of Columbia* (App.D.C.), 190 F.2d 25, 27:

> "In considering the propriety of any zoning order it must be remembered that zoning, by definition, requires that a boundary be drawn at some point, even though practical conditions may not change abruptly as the line is crossed. 'Some must suffer by the establishment of any territorial boundaries.' *L'Hote v. New Orleans*, 177 U.S. 587, 597, 20 S.Ct. 788, 792, 44 L.Ed. 899. That is the price to be paid in order that we may have effective zoning. The necessity and desirability of zoning and city planning can no longer be subject to debate."[3]

---

[3] Cf. Footnote 5, *Village of Belle Terre et al. v. Boraas, et al.*, supra, 42 Law Week 4477, quoting dissent of Mr. Justice Holmes in *Louisville Gas Co. v. Coleman*, 277 U.S. 32, 41.

III

Petitioners Did Not Exhaust Available Administrative and State Judicial Remedies.

Petitioners in seeking to raise a substantial Federal question ignored the concept of primary jurisdiction.

In *United States v. Western Pacific Railroad Co.*, 352 U.S. 59, 77 S.Ct. 161, 1 L.Ed 2d 126, this Court equated primary jurisdiction with exhaustion of administrative remedies. In so doing it noted:

> " 'Exhaustion' applies where a claim is cognizable in the first instance by an administrative agency alone; judicial interference is withheld until the administrative process has run its course."

Brawner Building, Inc. v. Shehyn, et al. (App.D.C.), 442 F.2d 847, applied this holding to zoning. In vacating the grant of a permanent injunction and remanding the case for further proceedings, the Court stated (p. 856):

> "A litigant entitled to permanent relief under the zoning regulations may be compelled to pursue his administrative remedies rather than be able either to resort to self-help or to seek an initial determination."

The Court cited in support of its action numerous decisions of this Court including *Best v. Humboldt Placer Mining Co.*, 371 U.S. 334, 338, 83 S.Ct. 379, 383, 9 L.Ed.2d 350; *United States v. Western Pacific Railroad*, 352 U.S. 59, 63-64, 77 S.Ct. 161, 165, 1 L.Ed.2d 126; *Port of Boston Marine Terminal Association v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62, 68-69, 91 S.Ct. 203, 208, 27 L.Ed.2d 203.

Petitioners, as found by the District Court, made no case under the Fourteenth Amendment. Historically, the Fifth Cir-

cuit Court of Appeals, has required a strong showing that a substantial Federal question existed. *Central Bank and Trust Company v. City of Miami Beach*, 392 F.2d 549, 551 contains the following language:

> "The federal issue was insubstantial—if not frivolous. This Court therefore will not pass on state issues dragged in through the back door by the doctrine of pendent jurisdiction." (cits.)

The en banc decision, complained of by Petitioners, accords with the foregoing.

The line of authority urged upon the court by Petitioners includes no decisions dealing with zoning. *Morgan v. United States*, 304 U.S. 1, was concerned with a hearing pursuant to a Federal statute. The remaining decisions cited by Petitioners involved ratemaking.

That such decisions are easily distinguishable is clearly demonstrated by the following quotation from *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U.S. 292, 303:

> "We have pointed out elsewhere that under the statute of Ohio no provision is made for a review of the Order of the Commission by a separate or independent suit. (cits.) A different question would be here if such a suit could be maintained with an intermediate suspension of the administrative ruling."

Obviously if, as here, an administrative or state afforded judicial remedy had been available a different result would have been reached.

Cf. *James v. Valtieira*, 402 U.S. 137, 91 S.Ct. 1331, 28 L.Ed. 2d 678.

CONCLUSION

In *Central Bank and Trust Company v. City of Miami Beach*, 5 Cir., 392 F.2d 549, 551, the Fifth Circuit Court of Appeals stated (550-551):

> "Property owners attacking the validity of zoning laws have a high wall to surmount."

If certiorari is granted and the en banc decision of the Fifth Circuit Court of Appeals overturned such property owners will have no wall to surmount. Every denial of an application for re-zoning will immediately become a federal case.

Respectfully submitted

HOSEA ALEXANDER STEPHENS
2335 National Bank of Georgia Building
Atlanta, Georgia 30303
Attorney for Respondents

HOMER M. STARK
P. O. Box 8
Lawrenceville, Georgia 30245
Of Counsel